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No. 86-387

In The

Supreme Court of the United States

October Term, 1986

HOWARD ELECTRICAL AND MECHANICAL, INCORPORATED,
Petitioner,

vs.

BAKER INDUSTRIES, INC.,
Respondent.

On Petition For Writ of Certiorari From The United States Court of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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On Petition For Writ of Certiorari From The United States Court of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Baker Industries, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case.

QUESTION PRESENTED

WHETHER THE FIFTH CIRCUIT ERRED IN DETERMINING THAT PETITIONER'S MOTION TO

ADD FINDINGS OF FACT WAS MADE PURSUANT TO RULE 52(b), RATHER THAN RULE 60(a), OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND IN DISMISSING PETITIONER'S APPEAL PURSUANT TO RULE 4(a)(4) OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

OPINION BELOW

The opinion of the Court of Appeals is reported in an unpublished opinion which appears at page A-16 of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

This case is a diversity action for damages for breach of contract based on the common law of the State of Texas. The case was tried to the court, the Honorable Barefoot Sanders presiding. Judgment was rendered for Plaintiff Baker Industries, Inc. ("Baker"), against Defendant Howard Electrical and Mechanical, Inc. ("Howard") on December 3, 1985. On December 6, 1985, Howard filed its Notice of Appeal, and on the same day filed its Request for Additional Findings of Fact and Conclusion of Law (its "Motion"). The District Court denied Howard's Motion on January 10, 1986. Subsequent to January 10, 1986, no notice of appeal was filed by Howard. On May 28, 1986, the Clerk of the United States Court of Appeals for the Fifth Circuit sent a letter to counsel requesting letter briefs on the question whether the appeal should be dismissed pursuant to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Appendix to Petition at A-14. Baker argued in its letter brief that Howard's Motion was a Rule

52(b) motion. The Fifth Circuit, in an opinion dated July 18, 1986, determined that Howard's Motion was a Rule 52(b) motion, and dismissed the appeal for want of jurisdiction. After the appeal had been dismissed, Howard asserted for the first time in its Petition for Rehearing that its Motion was a Rule 60 motion instead of a Rule 52(b) motion. By order dated August 19, 1986, the Fifth Circuit denied Howard's Petition for Rehearing.

REASONS FOR DENYING THE WRIT

1. The law with respect to Rule 4(a)(4) is clear and unambiguous.

The decision rendered by the Fifth Circuit in the instant case does not conflict with any decision of this Court or any decision of any other federal court of appeals. To the contrary, the Fifth Circuit's decision reflects a straightforward application of well-settled law with respect to Rule 4(a)(4) of the Federal Rules of Appellate Procedure ("FRAP Rule 4(a)(4)"), in accordance with the holding in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 784 L.Ed.2d 225 (1982) (per curiam). The Fifth Circuit determined that Howard filed a motion under Rule 52(b) of the Federal Rules of Civil Procedure ("Rule 52(b)") and filed its notice of appeal before the disposition of the Rule 52(b) motion. Appendix to Petition, A-16. Under FRAP Rule 4(a)(4), the notice of appeal was of no effect and a nullity. *In re Cobb*, 750 F.2d 477, 479 (5th Cir. 1985). Howard filed no notice of appeal subsequent to the disposition of its Rule 52(b) motion. Pursuant to FRAP Rule 4(a)(4), and *Griggs* and its progency, the Fifth Circuit was compelled to dismiss Howard's appeal for want of jurisdic-

tion. *Id.* This result is completely in accord with *Griggs*. Thus, the issue set forth in Howard's petition has been completely addressed in this Court's recent controlling decision in *Griggs*.

Howard does not and cannot cite any conflicting decisions from any other court with respect to the application of *Griggs* by the Fifth Circuit herein. The closest ostensible conflict Howard can find is the distinction from the *Griggs* holding set forth in *Federal Communications Commission v. League of Women Voters*, 468 U. S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278[1]. In *League of Women Voters*, the Court responds to an attempt by the appellee to apply the *Griggs* holding to a direct appeal from the District Court pursuant to 28 U.S.C. § 1252. *Id.* at 3114 n.10. The *League of Women Voters* decision in no way narrows or modifies *Griggs*. To the contrary, the Court points out that the rule addressed in *Griggs* has "no direct equivalent" in a direct appeal under § 1252. *Id.* Since the instant appeal was not a direct appeal under § 1252, the *League of Women Voters* holding is irrelevant.

2. The Court below fully considered and correctly decided the issue.

The Fifth Circuit reviewed Howard's Motion and determined that it was a motion made pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. Under FRAP Rule 4(a)(4), any notice of appeal prior to the disposition of a Rule 52(b) motion is regarded as a nullity and of no effect. *Griggs, supra*, 103 S.Ct. at 403.

[1] None of the other authorities cited in the Petition address the application of FRAP Rule 4(a)(4). Although *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983), refers in passing to *Griggs*, it does not consider FRAP Rule 4(a)(4) directly.

In its Petition, Howard does not dispute that under FRAP Rule 4(a)(4), a notice of appeal filed prior to the disposition of a Rule 52(b) motion is of no effect. Instead, Howard contends that its Motion was made pursuant to Rule 60(a) of the Federal Rules of Civil Procedure ("Rule 60(a)"), rather than Rule 52(b). The determination of the character of Howard's Motion is essentially factual, and was addressed in the briefs and decision in the Fifth Circuit. Baker argued to the Fifth Circuit in its letter brief that because Howard's Motion requested that the district court make additional findings of fact, and because the only express vehicle for adding findings of fact is Rule 52(b), that Howard's Motion must be deemed a Rule 52(b) motion. Appendix, A-2. The Fifth Circuit apparently agreed, stating "the motion clearly appears as a motion to the district court to 'make additional findings'. Fed.R.Civ.P. 52(b)." Appendix to Petition, A-19 n.3. Thus, this essentially factual issue was fully reviewed and correctly decided by the court below.

Furthermore, certiorari is not ordinarily granted to review evidence and discuss specific facts. *See Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 478, 60 S.Ct. 693, 699, 84 L.Ed. 869 (1940); *United States v. Johnston*, 268 U.S. 220, 45 S.Ct. 496, 497 69 L.Ed. 925 (1925). The issue presented for review in the Petition requires this Court to review a factual determination made by the Fifth Circuit. This sort of factual review is not an appropriate basis for certiorari.

3. The question presented is waived for failure to raise it in the Court of Appeals.

The sole question presented in the Petition is whether

Howard's Motion for additional findings of fact is a Rule 60(a) motion rather than a Rule 52(b) motion. If Howard's Motion could be deemed a Rule 60(a) motion, it would fall outside of the purview of FRAP Rule 4(a)(4), and would not have nullified Howard's notice of appeal. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983). However, Howard failed to timely present this argument to the courts below, and has thereby waived it.

Howard's Motion for additional findings of fact makes no reference to Rule 60 of the Federal Rules of Civil Procedure. Appendix to Petition, A-11. Further, Howard's Motion does not purport to be offered for the purpose of correcting clerical mistakes or errors arising from oversight or omission, which are necessary for a Rule 60(a) motion. *Id.* To the contrary, Howard's Motion seeks only to have the district court make additional findings of fact and conclusions of law, which places the motion squarely within the scope of Rule 52(b). Thus, Howard did not expressly or by implication suggest to the district court that its Motion was a Rule 60(a) motion.

Similarly, when the parties addressed the issue of the efficacy of Howard's notice of appeal in letter briefs to the Fifth Circuit, Howard did not assert that its Motion for additional findings had been brought under Rule 60(a). Appendix, A-5. An argument not raised on appeal will not be considered by the Supreme Court. *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 3281 n. 10, 73 L.Ed.2d 1012 (1982).

In its Petition for Rehearing, Howard raised for the first time in its contention that its Motion for additional findings was a Rule 60(a) motion. Appendix to Petition,

A-21. Thus, this issue was first raised after the Fifth Circuit issued its opinion dismissing Howard's appeal. An argument first raised at the rehearing stage in the Court of Appeals will not be considered by the Supreme Court. *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 1998 n. 25, 80 L.Ed.2d 590 (1984). Howard failed to timely raise its contention that its motion for additional findings of fact was brought pursuant to Rule 60(a). This issue has been waived, and cannot be the basis for granting certiorari.

4. Howard's Motion is not a Rule 60 motion.

Even if Howard had not waived its Rule 60 argument, that argument must fail. Howard's Motion makes no reference to Rule 60. Rule 60(a) provides for certain relief in limited instances to correct clerical mistakes or errors arising from oversight or omission. *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986). Howard's Motion does not attempt to assert that the relief sought is connected in any way with the correction of clerical mistakes or errors from oversight or omission. To the contrary, Howard's Motion seeks to add additional findings of fact and conclusions of law, placing it clearly within the scope of Rule 52(b). The Court of Appeals correctly determined that Howard's motion was brought pursuant to Rule 52(b).

CONCLUSION

For the above reasons, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(214) 997-9000
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been mailed by certified mail, return receipt requested, to William Andress, Jr., counsel for Petitioner, on this the 9 day of October, 1986.

Richard V. Normington

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APPENDIX

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June 2, 1986

Mr. Gilbert F. Ganucheau
Clerk of the U.S. Court of Appeals
for the Fifth Circuit
U. S. Court of Appeals Courthouse
600 Camp Street, Room 109
New Orleans, LA 70130

Re: Cause No. 85-1758; *Howard Electrical and Mechanical, Inc. vs. Baker Industries, Inc.*

Dear Mr. Ganucheau:

I write in response to the Court's request for an analysis of its jurisdiction of the above-referenced matter. Because the appellant has failed to file a valid notice of appeal, it appears that the Court of Appeals lacks jurisdiction of this matter, and that therefore the appeal must be dismissed.

The following events are significant in the resolution of this jurisdictional question. Final judgment was entered by the District Court on December 3, 1985, awarding damages to Plaintiff Baker Industries, Inc. ("Baker"), against Defendant Howard Electrical and Mechanical Incorporated ("Howard"). On December 6, 1985, Howard filed its notice of appeal. On December 6, 1985, Howard also filed Defendant's Request for Additional Findings of Fact and Conclusion of Law. On January 10, 1986, the District Court entered its order denying the Defendant's Request for Additional Findings of Fact and Conclusions of Law. Subsequent to January 10, 1986, no notice of appeal was filed. Further, Howard failed to file any document which could be considered the equivalent of a notice of appeal.

As a result of the foregoing events, the Court of Appeals lacks jurisdiction over this matter, because no valid notice of appeal has been filed. The filing of a notice of appeal is an event of jurisdictional significance which is necessary to confer jurisdiction on the court of appeals. *Griggs v. Provident Consumer Discount Company,* 103 S.Ct. 400, 402 (1982). While appellant Howard filed a Notice of Appeal on December 6, 1985, that notice has no effect, because it was filed before the disposition of its motion to make additional findings of fact.[2] Rule 4(a)(4) of the federal Rules of Appellate Procedure states that a notice of appeal filed before the disposition of a post-judgment motion pursuant to several specified provisions of the Federal Rules of Civil Procedure, including Rule 52(b), shall have no effect, and that a new notice of appeal must be filed after the entry of the order disposing of the post-judgment motion. Because Howard filed a post-judgment motion pursuant to Rule 52(b) of the Federal Rules of Civil Procedure concurrently with the filing of its notice of appeal, the notice of appeal became a nullity. In *Griggs,* the Court makes it clear that the requirements for notice of appeal under Rule 4 are to be strictly and literally applied. Howard's failure to file a new notice of appeal after the disposition of its post-judgment motion is to be treated as if "no notice of appeal were filed at all." *Griggs, supra,* at 403.

[2] Howard's post-judgment motion, captioned Defendant's Request for Additional Findings of Fact and Conclusions of Law, is a motion filed under Rule 52(b) of the Federal Rules of Civil Procedure. The motion sought to have the District Court make additional findings of fact. Rule 52(b) is the only mechanism under the Federal Rules of Civil Procedure for a party to request additional findings of fact after the rendition of judgment. Thus, Howard's motion is a rule 52(b) motion. *See, e.g., Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.,* 784 F.2d 665, 667 (5th Cir. 1986) (Court looks to substance of motion, not designation of movant).

This court has had several opportunities to consider defective notices of appeal under Rule 4 since *Griggs*, and has consistently held that any failure to comply with Rule 4 deprives it of jurisdiction. *See, e.g., In re Cobb*, 750 F.2d 477 (5th Cir. 1985); *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 746 F.2d 278 (5th Cir. 1984); *Van Wyk El Paso Investment, Inc. v. Dollar Rent-A-Car Systems, Inc.* 719 F.2 806 (5th Cir. 1983). In *Harcon Barge Co., supra,* this court recognized that it was bound by *Griggs* to dismiss an appeal when no notice of appeal had been filed after the disposition of a post-judgment motion.

In *Van Wyk, supra,* the court addressed the equivalence of any other documents filed after the disposition of a post-judgment motion to a new notice of appeal. *Van Wyk* holds that the memoranda and correspondence which are normally transmitted in the course of processing an appeal do not constitute equivalents of notice of appeal. In this case, the memoranda and correspondence filed by Howard after the disposition of its post-judgment motion are no different from the memoranda and correspondence discussed in *Van Wyk*. Thus, Howard failed to file an equivalent of a notice of appeal after its post-judgment motion was denied.

Further, the time for filing a notice of appeal has passed, so it is impossible for Howard to cure its failure to file a proper notice. Rule 4 of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed within 30 days of the entry of an order disposing of a post-judgment motion. The appellant may obtain an additional 30 days by motion to the district court. Thus, the last possible date for filing a notice of appeal herein was

60 days after January 10, 1986, or March 11, 1986. Howard's failure to file a notice of appeal by March 11, 1986 cannot be cured.

Howard's notice of appeal filed on December 6, 1985, was nullified by its filing of its post-judgment motion to make additional findings of fact on the same date. Howard's failure to file a notice of appeal after the disposition of its post-judgment motion leaves this matter in the posture that, in effect, no notice of appeal has been filed. Because there is no notice of appeal, this Court lacks jurisdiction over this matter, and this appeal must be dismissed.

Very truly yours,
Richard V. Normington

RVN: 1b
cc: William Andress, Jr.

Honorable Gilbert Ganacheau
Clerk of the United States Court
of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 85-17158 *Howard Electrical & Mechanical, Inc. vs. Baker Industries, Inc.*

Dear Mr. Ganacheau:

In response to your letter of May 29, signed by Richard E. Windhorst, Jr., as Chief Deputy Clerk, on behalf of Howard Electrial & Mechanical, Inc., we should like to make in limine the following corrections in the statements therein.

That letter says that on December 6, 1985, a motion to amend findings of fact and conclusions of law was filed, and that on January 10, 1986, the District Court denied that motion to amend findings of fact and conclusions of law. There was no motion to amend findings of fact and conclusions of law, nor did the Order overruling the Motion so state. The Motion as filed on behalf of Howard specifically moved the Court to "make the following additional findings of fact which were not included in those made by the Court at the time of the decision," and were for the purpose of filling the lacunae in the findings for use by the Appellant exclusively in connection with the appeal, and not seeking any relief to amend or correct anything done in the trial court. The Order of the Court filed on January 10, specifically so stated, that he was considering "Defendant's request for additional findings of fact and conclusions of law" and was of the opinion that the relief sought "is unsupported and unwarranted."

This situation, therefore, is not within the parameters of *Griggs vs. Povident Consumer Discount Company*, 459 U.S. 56, 103 S. Ct. 400, 74 L.Ed.2d. 225, where the appellant affirmatively sought by motion to alter or amend the judgment. No such attempt was made in the instant case, where the Appellant merely asked for matters appearing in the evidence but not listed in what the Court considered to be the most essential findings, and the Appellant con-sidered the additional findings sought to be consonant with its position. In *Griggs* the Supreme Court quoted from the explanation of the advisory committee in connection with Rule 4(a)(4) of the Federal Rules of Appellate Procedure that it would be undesirable to proceed with the appeal while the District Court has before it a motion for granting of which would vacate or alter the judgment appealed from." There was no such relief here sought, nor would it result, but it would simply permit the Appellant, on appeal, and on appeal only, to challenge the judgment itself from matters already on record.

Our conclusion is therefore in accord with the reasoning in *Leishman vs. Associated Wholesale Electric Company*, 318 U.S. 203, 87 Law Ed. 714, which reasoning was followed by the United States Supreme Court in *United States vs. Crescent Amusement Company*, 323 U. S. 173, 177, 89 Law Ed. 160, 165, holding that a motion such as ours which was addressed to mere matters of form and did not raise questions of substance for a reconsideration of basic findings and the alteration of the conclusion of the Court as embodied in its judgment, but merely sought to supplement findings for use on appeal.

In fact, that is precisely what the Supreme Court itself considered the effect of *Griggs* to be, in its footnote 10 to its opinion in *Federal Communications Commission vs. League of Women Voters of California*, 498 U.S. —, 104 Supreme Court 3106, 82 Law Ed. 278 at 287, where in commenting on the application of *Griggs* the majority held that "we have emphasized that the rule requiring suspension of a judgment's finality for purpose of appeal during the pendency of a post-judgment motion for reconsideration applies only when such a motion actually seeks an 'alteration of the rights adjudicate in the Court's first judgment'," citing *Department of Banking vs. Pink*, 317 U. S. 264, 266, 87 Law Ed. 254, 63 Supreme Court 233 (1942) (per curiam); and *F. T. C. vs. Minneapolis-Honeywell Company*, 344 U. S. 206, 211, 97 Law Ed. 245, 75 Supreme Court 245 (1952) ("mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which review must be sought").

This is quote in line with decisions in lower courts. In *U. S. vs. Forness*, 125 Fed. 2d. 928, by the Second Circuit in 1942, certiorari denied, 86 Law Ed. 1764, 316 U. S. 694, it was specifically held that proposed but unadopted findings were not a part of the record, and it had been held by a district court for the Northern District of California in 1958, in *Hekkila vs. Barber*, 164 Fed.Supp. 587, that a motion to modify findings does not raise matters which go to the substance of the judgment, for the findings themselves do not go to the substance of the judgment," citing a decision of the Ninth Circuit in 1951 in *Staccone vs. Morse-Starrett Products*, 191 Fed. 2d. 197. In fact, we have been unable to find any case or rule

which requires the District Court to actually enter an order refusing to file supplemental or additional findings, and since they do not constitute a portion of the record, the order of January 10, in the instant case appears to be surplusage, and is certainly not within the scope of *Griggs*.

Accordingly, we respectfully submit that requesting additional findings and their refusal do not seek alteration of the judgment from which the appeal has been made, and do not trigger the necessity for another Notice of Appeal under *Rule 4(a)(4)* of the Federal Rules of Appellate Procedure, and the jurisdiction of the United States Court of Appeals for the Fifth Circuit has properly vested, been properly briefed, and should be decided upon its merits.

Respectfully Submitted,

A/d.

cc: Mr. Richard Normington
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